A PUBLICATION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Supreme Court Report

VOLUME 26, ISSUE 10 ■ APRIL 12, 2019

This *Report* summarizes opinions issued on March 20, 26, and 27, and April 1, 2019 (Part I); and cases granted review on April 1, 2019 (Part II).

I. Opinions

● *Bucklew v. Precythe*, 17-8151. In a 5-4 decision, the Court held that Missouri's plans to execute a prisoner by lethal injection did not violate the Eighth Amendment's prohibition on cruel and unusual punishment, notwithstanding the prisoner's rare medical condition that he contends will cause severe pain under the proposed method of execution. Bucklew was convicted of murder and sentenced to death. Missouri plans to execute Bucklew by lethal injection with pentobarbital. Bucklew filed suit claiming that this proposed method of execution, as applied to him, would violate the Eighth Amendment: "Whether or not it would cause excruciating pain for *all* prisoners . . . Bucklew now contended that the State's protocol would cause *him* severe pain because of his particular medical condition." This condition, cavernous hemangioma, causes vascular tumors that are at risk of rupture in his head, neck, and throat. The district court dismissed Bucklew's challenge but the Eighth Circuit remanded to allow Bucklew "to identify an alternative procedure that would significantly reduce the risks he alleged would flow from the State's lethal injection protocol." On remand, Bucklew identified execution by nitrogen gas as an alternative. The district court held, however, that "Mr. Bucklew's claim failed because he had produced no evidence that his proposed alternative . . . would significantly reduce" the risk of choking and perceived suffocation. The Eighth Circuit affirmed. In an opinion by Justice Gorsuch, the Court affirmed.

The Court first considered whether the standards for Eighth Amendment challenges set forth in *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. ___ (2015), govern as-applied challenges. Considering definitions of "cruel" and "unusual" from the time of the framing, the Court concluded that "the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." Rather, "what unites the punishments the Eighth Amendment was understood to forbid . . . is that [they] were long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddit[ion] of terror, pain, or disgrace." To establish a violation of the Eighth Amendment, therefore, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason."

The Court rejected "Bucklew's argument that a different standard entirely should govern as-applied challenges . . . because 'certain categories' of punishment are 'manifestly cruel . . . without reference to any alternative methods.'" The Court found this argument "foreclosed by" *Glossip's* holding that "identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain." Second, Bucklew's argument is "inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest." "At common law, . . . methods of execution . . . were understood to be cruel precisely because—by comparison to other available methods—they went so far beyond what was needed to carry out a death sentence that they could only be explained as reflecting the infliction of pain for pain's sake." Next, the Court offered several other reasons for rejecting different standards for as-applied and facial challenges to

a method of execution under the Eighth Amendment. "[C]lassifying a lawsuit as facial or as applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." Finally, the Court dismissed arguments that the *Baze-Glossip* test imposed an impermissible burden on Bucklew. "An inmate seeking to identify an alternative method of execution," the Court explained, "is not limited to choosing among those presently authorized by a particular State's law." "In light of this," the Court saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution."

The Court then turned to whether Bucklew had established a "genuine issue of material fact" on the *Baze-Glossip* test that would warrant a reversal of the summary judgment—that is, whether he has "identified a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain." First, the Court considered Bucklew's "proposed alternative method" of nitrogen hypoxia. It concluded that Bucklew had failed to show that the method was "not just theoretically 'feasible,' but also 'readily implemented.'" The Court explained: "He has presented no evidence on essential questions like how nitrogen gas should be administered . . .; in what concentration . . .; how quickly and for how long it should be introduced; or how the State might ensure the safety of its execution team . . . ." Second, the Court determined that "the State had a 'legitimate' reason for declining to switch from its current method of execution as a matter of law": the State did not want "to be the first to experiment with a new method of execution."

The Court also found that even if Bucklew had established a readily available alternative method of execution, his claim would fail because he did not show that nitrogen hypoxia "would significantly reduce a substantial risk of severe pain." "A minor reduction in risk is insufficient; the difference must be clear and considerable." The risks of ruptured veins and tumors and impaired breathing, the Court assessed, "rest on speculation unsupported, if not affirmatively contradicted, by the evidence in this case." The Court also rejected Bucklew's contention that the proposed lethal injection would result in a "sense of suffocation" when he "'lose[s] the ability to manage' the tumors in his airway." It found that "the record contains insufficient evidence" to establish that this "sense of suffocation" will last any longer with lethal injection than with nitrogen hypoxia. In a final section of its opinion, the Court discussed the length of time that has transpired since Bucklew's conviction and lamented the frustration of the "timely enforcement" of Bucklew's sentence. It advised that "[c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay." The Court concluded that "federal courts 'can and should' protect settled state judgments from 'undue interference' by invoking their 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories."

Justice Thomas wrote a concurring opinion in which he reasserted his view from *Baze v. Rees*, 553 U.S. 35, 94 (2008), that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." He disputed Justice Breyer's dissent's description of this view as "render[ing] the Eighth Amendment 'a static prohibition' prohibiting only the same things that it proscribed in the 18th century.'" Justice Thomas joined the Court's opinion in full "because it correctly explains why Bucklew's claim fails even under the Court's precedents." Justice Kavanaugh wrote a

concurring opinion "to underscore the Court's additional holding that the alternative method of execution" an inmate must identify under the *Baze-Glossip* test "need not be authorized under current state law—a legal issue that had been uncertain before today's decision."

Justice Breyer wrote a dissent, which Justices Ginsburg, Sotomayor, and Kagan joined in part. Justice Breyer identified "three questions" that the Court raised and (in his view) answered incorrectly: (1) "whether Bucklew has established genuine issues of material fact concerning whether executing him by lethal injection would cause him excessive suffering"; (2) "whether a prisoner like Bucklew with a rare medical condition must identify an alternative method by which the State may execute him"; and (3) "how to minimize delays in executing offenders who have been condemned to death." First, the dissent concluded that "Bucklew has easily established a genuine issue of material fact regarding whether an execution by lethal injection would subject him to impermissible suffering." The dissent cited to a number of quotations of Bucklew's expert witness that it described as "extensive testimony regarding the pain that Bucklew would likely endure in an execution by lethal injection." The dissent disputed the majority's portrayal of the record as containing "nothing . . . to suggest that Mr. Bucklew will be capable of experiencing pain for significantly more than 20 to 30 seconds after being injected with pentobarbital" and the majority's contention that the expert "rel[ied] exclusively or even heavily" upon a misinterpreted study of euthanasia in horses. Regardless, the dissent contended, these are factual disputes that do not warrant summary judgment.

Second, the dissent opined that *Glossip*'s "'alternative method' requirement" should not apply in this case. In an as-applied challenge like Bucklew's, it reasoned, the concern in *Glossip* of "method-of-execution challenges . . . becoming a backdoor means to abolish capital punishment in general" does not exist. Nor does an as-applied challenge risk intruding "on the role of state legislatures in implementing their execution procedures," because a legislature "will rarely consider the method's application to an individual who, like Bucklew, suffers from a rare disease." And if a benchmark is needed against which to compare the method of execution to see whether too much pain is imposed, a court can contrast Bucklew's proposed execution with the lethal injection of prisoners without Bucklew's medical condition. In addition, not extending *Glossip* avoids the "troubling implications of today's ruling": that it "permits a State to execute a prisoner who suffers from a medical condition that would render his execution no less painful" than "'horrid modes of torture' such as burning at the stake'" and "convert[s] the Eighth Amendment 'categorical prohibition into a conditional one.'" The dissent also opined that even "assuming for argument's sake that Bucklew must bear the burden of showing the existence of a 'known and available' alternative method of execution that 'significantly reduces a substantial risk of severe pain,' Bucklew has satisfied that burden." Bucklew's evidence of the alternative of nitrogen hypoxia is supported by state laws that permit the gas as a method of execution and reports from states that "nitrogen hypoxia would be simple and painless." "Presented with evidence such as Bucklew's," the dissent "believe[d] a State should take at least minimal steps to determine the feasibility of the proposed alternative."

In a final section of Justice Breyer's opinion, writing for himself alone, he "agree[d] with the majority that . . . delays [in the execution of offenders] are excessive." He wrote that while "[i]t might be possible to end delays by limiting constitutional protections for prisoners on death row," "to do so would require us to pay too high a constitutional price." Justice Breyer concluded by observing the possibility that the goals of constitutionality and expediency may be incompatible: "[I]t may be that,

as our Nation comes to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty."

Justice Sotomayor wrote a separate dissent observing that as she has "maintained ever since the Court started down this wayward path in *Glossip v. Gross*, there is no sound basis in the Constitution for requiring condemned inmates to identify an available means for their own execution." She also contested the majority's discussion of delays in death penalty litigation. Justice Sotomayor was "especially troubled by the majority's statement that '[l]ast-minute stays should be the extreme exception'" and opined that "[w]ere those comments to be mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role." The "principles of federalism and finality," she said, "are already amply served by other constraints on our review of state judgments"; "[t]here are higher values than ensuring that executions run on time."

● *Sturgeon v. Frost,* 17-949. The Court unanimously held that the Alaska National Interest Lands Conservation Act (ANILCA) prohibits the National Park Service from regulating hovercraft use on rivers within Alaska national parks. ANILCA created new national parks, monuments, and preserves—"conservation system units," in the parlance of the Park Service—and expanded old ones. See 16 U.S.C. §§410hh–410hh-1. In doing so, Congress followed topographic or natural features, rather than the boundaries of federally owned lands, resulting in national parks that contain both federal and non-federal land, with the latter (known as "inholdings") made up of state, native, and private lands. §3102(4). But because ANILCA sought to balance protection of the national interest in the natural value of public lands in Alaska with the economic and social needs of Alaska and its peoples, §103(c) provides that only "public lands"—defined as lands, waters, and associated interests "the title to which is in the United States," §3102(2)—"shall be deemed to be included" in conservation system units. Section 103(c) further provides that no state, native, or private inholdings "shall be subject to the regulations applicable solely to public lands within such units," unless purchased by the Secretary of the Interior. Under the Alaska Statehood Act, which incorporated the Submerged Lands Act of 1953, Alaska holds title to the land beneath the Nation River and regulatory authority over navigation, fishing, and other public uses of the river. The question was whether the National Park Service has authority to regulate the use of hovercrafts on the stretch of the Nation River that flows through the Yukon-Charley Rivers National Preserve, a national park in Alaska.

While traveling by hovercraft on the Nation River to his favorite moose-hunting spot, John Sturgeon was stopped by park rangers and informed that National Park Service regulations prohibited the use of hovercrafts on rivers within federal parks. Sturgeon sued the Alaska Regional Director of the National Park Service, seeking an injunction to allow him to resume using his hovercraft on the river. He claimed that the river is not "public land" subject to Park Service regulation. The district court granted summary judgment in favor of the Park Service, and the Ninth Circuit affirmed based on its interpretation of ANILCA as exempting inholdings only from Park Service regulations applicable "solely to public lands within[conservation system] units" *in Alaska*. The Court rejected this interpretation and remanded for consideration of whether the Nation River is "public land" for purposes of ANILCA and whether, if it is not, the Park Service nonetheless may regulate Sturgeon's activities on the stretch of the river passing through the park. The Ninth Circuit concluded that the river is public land under §103(c). In an opinion by Justice Kagan, the Court reversed and remanded.

The Court analyzed the statutory text and concluded that the Nation River is not public land within the meaning of §103(c) because it is not federally owned. The United States has "title" to neither the waters—for running waters cannot be owned—nor the land beneath the waters, which belong to Alaska. The Court rejected the Park Service's argument that the United States has title to an *interest* in the river under the reserved-water-rights doctrine. Under that doctrine, when the government reserves land for a federal purpose, it has a usufructuary right to the waters needed to effect that purpose and may prevent depletion or diversion of those waters as necessary to protect that purpose. The Court concluded that "title" applies to fee ownership of property or possessory interests in property, not usufructuary rights. Moreover, the Court found that Sturgeon's use of a hovercraft would not implicate a reserved water right in the Nation River because it neither depleted nor diverted any water. Nor was the Park Service regulation against hovercraft use intended to protect the Nation River; it was directed against the "sight or sound" of "motorized equipment" in remote locations, which is unrelated to safeguarding the water.

Having determined that the Nation River is not public land under ANILCA, the Court concluded that the Park Service lacks authority to regulate hovercraft use on it. The Court reasoned that because "[o]nly" the public lands within a conservation system unit are "deemed" to be part of that unit under §103(c), all non-public lands within the units' geographic boundaries are "deemed" not to be part of the unit. The Court further noted that §103(c) provides that no state, native, or private lands "shall be subject to the regulations applicable solely to public lands within [conservation system] units." Therefore, ANILCA exempts inholdings from the Park Service's general authority to regulate all lands within conservation system units. The Court rejected the Park Service's interpretation of §103(c)'s provision exempting inholdings from rules "applicable solely to public lands" as exempting them only from rules that on their face apply only to public lands. The Court reasoned that this interpretation of the provision renders it a truism, defeats the purpose of the related provision that only public lands are "deemed" part of the conservation system unit, and would undermine the bargain ANILCA struck between federal and Alaskan land management interests.

Justice Sotomayor, joined by Justice Ginsburg, concurred separately to emphasize that the Court held only that the Park Service cannot regulate the Nation River as if it were within Alaska's federal park system, not that the Park Service lacks all authority over the river. Specifically, Justice Sotomayor noted that the Court's holding does not foreclose the possibility that the Park Service may regulate rivers running through parks when doing so is necessary or proper to protect public lands within the parks. Nor does the opinion foreclose the possibility that the Park Service may regulate as parklands those navigable rivers that, unlike the Nation River, have been designated as "Wild and Scenic Rivers."

● *Frank v. Gaos*, 17-961. In a *per curiam* decision, the Court by an 8-1 vote remanded the case for an initial determination of standing in light of *Spokeo, Inc. v. Robins*, 578 U.S. __ (2016), which held that standing requires a concrete injury, even in the context of a statutory violation. Respondents brought a class action lawsuit against Google, alleging that Google violated the Stored Communications Act when it gave internet users' search terms to advertisers. Google defended on multiple grounds, including alleging that respondents did not have standing because they failed to establish a cognizable injury. The standing defense was ultimately abandoned in district court. The parties

reached a settlement where Google would pay $8.5 million. The money would be distributed among the named class representatives, respondents' attorneys, and six *cy pres* recipients (nonprofit organizations) that would promote internet privacy initiatives. No money would be paid to unnamed class members. Five class members objected to the settlement, arguing that the *cy pres* relief did not comply with Federal Rule of Civil Procedure 23(e)(2), which requires that class settlements be fair, reasonable, and adequate. The district court approved the settlement, and the objecting class members appealed to the Ninth Circuit. While that appeal was pending, the Court decided *Spokeo*, which held that "a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it." The Ninth Circuit approved the settlement without addressing *Spokeo*. After granting certiorari here, the Court requested supplemental briefing on standing. Through a per curiam opinion, the Court vacated and remanded.

The Court held that it has an obligation to assure itself of litigants' standing, which extends to review of court approval of class action settlements. Such settlements cannot be approved by a court that does not have jurisdiction, and standing is a jurisdictional requirement. Noting that it does not decide issues in the first instance, the Court concluded that "[r]esolution of the standing question should take place in the district court or the Ninth Circuit in the first instance."

Justice Thomas dissented, explaining that he would reach the merits and reverse. He relied on his concurring opinion in *Spokeo*, where he concluded that a plaintiff seeking to vindicate a private right establishes standing with an allegation of an invasion of that right. Applied here, he would find that the parties have standing. On the merits, Justice Thomas concluded that "because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, . . . the class action should not have been certified, and the settlement should not have been approved."

● *Lorenzo v. SEC*, 17-1077. In a 6-2 opinion, the Court held that that one can be liable under SEC Rules 10b-5(a) and (c), as well as related statutes, for disseminating false or misleading statements with the intent to defraud investors, even if one did not "make" the statement. Rule 10b-5 makes it unlawful to engage in three practices in connection with the purchase or sale of any security: to (a) "employ any device, scheme, or artifice to defraud"; (b) "make any untrue statement of material fact"; or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit." In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), the Court held that only one with ultimate authority over a statement's content and communication is the maker of that statement for purposes of subsection (b). In this case, the Court considered whether one who does not "make" statements under subsection (b) can be found to have violated subsections (a) and (c) for disseminating others' false statements with the intent to defraud.

Waste2Energy, a company developing renewable energy technology, stated in a public filing that its intellectual property was valued at more than $10 million when in fact it was worthless. Petitioner Francis Lorenzo, the director of an investment banking firm hired by Waste2Energy to sell debentures (a form of debt secured by the debtor's earning power rather than assets), learned of this falsehood. At his superior's behest, he sent e-mails to prospective investors in which he described the debenture offering as being protected by $10 million in "confirmed assets." The SEC found that Lorenzo violated Section 10b-5 by sending false statements to investors with intent to defraud. The

D.C. Circuit agreed that with Lorenzo's position that, under *Janus*, it was his superior—who had ultimate authority over the content and distribution of the false emails—who "made" the false statements for the purposes of Rule 10b-5(b). But the court sustained the Commission's finding under subsections (a) and (c). In an opinion by Justice Breyer, the Court affirmed.

The Court considered the language of Rules 10b-5(a) and (c) and concluded that they covered dissemination of false statements with the intent to defraud. The Court found this conclusion supported by the expansive dictionary definitions of the terms in subsections (a) and (c)—"device," "scheme," and "artifice to defraud"—which describe any plan or design to defraud investors. The Court rejected Lorenzo and the dissent's position that liability for false statements is limited to subsection (b), the only subsection that refers specifically to false statements. It reasoned that the subsections were not intended to govern mutually exclusive spheres of conduct. Rather, each prohibition added to the statutory and regulatory scheme was intended to prohibit additional, specific conduct, not to narrow the scope of prior, more general prohibitions. The Court noted that subsections (a) and (c) also overlap one another, with some conduct constituting "employ[ing]" a "device, scheme, or artifice to defraud" under subsection (a) also constituting "engag[ing] in a[n] act . . . which operates as a fraud" under subsection (c).

The Court further noted that under Lorenzo and the dissent's position, Lorenzo's "paradigmatic example of securities fraud"—making false representations with the intent to defraud investors—would fall outside the scope of the Rule, defeating the basic purpose of securities laws: to achieve a high standard of business ethics in the securities industry by requiring full disclosure. Finally, the Court rejected the argument that its construction of Rule 10b-5 is unreasonable because it allows the same conduct to create primary liability for one offense (disseminating false statements under subsections (a) and (c)) and secondary liability for aiding and abetting another offense (making false statements under subsection (b)). The Court noted that conduct that aids and abets one offense is frequently a separate offense itself.

Justice Thomas dissented, joined by Justice Gorsuch. Justice Thomas understood the terms "device," "scheme," and "artifice" in subsection (a) to denote planning or strategizing, such as schemes to short sell or price rig, not statements disseminated in furtherance of another's plan or strategy. Although communications might aid and abet an offense under subsection (a), they are not themselves a violation. Justice Thomas acknowledged that subsection (c) appears broader, but viewed it as excluding false statements, which he viewed as covered exclusively by subsection (b), the only subsection specifically addressing false statements. Justice Thomas also viewed the Court's opinion as incorrectly blurring the distinction between primary and secondary lability in fraudulent-misstatement cases, making conduct that merely aids and abets a subsection (b) violation subject to primary liability under subsections (a) and (c). Justice Thomas found this distinction important because private rights of action are unavailable against aiders and abettors.

● *Obduskey v. McCarthy & Holthus LLP*, 17-1307. The Court unanimously held that nonjudicial foreclosure of a home is not debt collection for purposes of the Fair Debt Collection Practices Act (FDCPA). That act addresses "deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). It defines debt collectors as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly

collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §1692a(a)(6). The definition goes on to specify that "[f]or the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.* Here, state law included a process for nonjudicial foreclosure of a home mortgage, which permits a lender to sell a home at auction to recover on a defaulted loan, without a separate money judgment. The question was whether such nonjudicial foreclosure is collection of a debt that falls within the FDCPA. Petitioner Obduskey defaulted on a home loan. Respondent is a law firm hired to foreclose on the home. It sent correspondences commencing the nonjudicial foreclosure process. Obduskey sued, alleging that respondent's foreclosure activities violated the FDCPA by failing to provide verification of the debt upon request. Respondent defended on grounds that it was not a debt collector subject to the FDCPA. The district court dismissed the lawsuit. The Tenth Circuit affirmed on the ground that enforcement of a security interest, as opposed to collecting a debt, does not fall within the FDCPA. In an opinion by Justice Breyer, the Court affirmed.

The Court acknowledged that "if the FDCPA contained *only* the primary definition [of debt collector], a business engaged in nonjudicial foreclosure proceedings would qualify as a debt collector for all purposes." But the law also specifies that "[f]or the purpose of section 1692f(6) of this title, [debt collector] also includes . . . any business"—such as nonjudicial foreclosure—"the principal purpose of which is the enforcement of security interests." The Court reasoned that this "strongly suggests that one who does no more than enforce security interests does *not* fall within the scope of the general definition. Otherwise, why add this sentence at all?" Second, the Court found that Congress may have intended the FDCPA not to apply to nonjudicial foreclosure to avoid conflicts with state law, such as the state processes in this case. Finally, it noted that legislative history indicates that Congress considered versions of the FDCPA that would have wholly included or excluded security enforcement, but settled on a version that regulated such actions only in the limited ways described in §1692f(6). This, the Court found, indicated a compromise that excluded security enforcement from most of the FDCPA's reach.

The Court rejected four counterarguments. First, Obduskey argued that §1692f(6) applies only to personal property, so the section of the "debt collector" definition that would appear to exclude security enforcement should apply only to people who enforce security interests against personal property, such as "repo men" who take cars. The Court found this argument unsupported by the text, which does not distinguish between personal and real collateral. Second, Obduskey appealed to a venue selection provision that requires real estate foreclosure actions to be brought where the real estate is located. He said this provision makes no sense if it applies to judicial foreclosure but not nonjudicial foreclosure. The Court held that this has no direct application to a nonjudicial foreclosure and does not alter the definition of a debt collector. Finally, the court was unpersuaded that its ruling would create a loophole in the FDCPA because states can adequately guard against abuses.

Justice Sotomayor concurred, explaining that this was a close case, indeed "too close a case for me to feel certain that Congress recognized that this complex statute would be interpreted the way that the Court does today." The concurrence noted that the decision permits Congress to clarify that nonjudicial foreclosures are covered by the FDCPA, and stressed that the decision is cabined to

only the type of good-faith actions presented here. It would be a "different case" if "the defendant went around frightening homeowners with the threat of foreclosure without showing any meaningful intention of ever actually following through."

● *Biestek v. Berryhill,* 17-1184. By a 6-3 vote, the Court rejected a proposed categorical rule that the Social Security Administration (SSA) may never rely on a vocational expert's testimony regarding the availability of certain jobs as substantive evidence to deny benefits to an applicant where the expert refused to provide the applicant with the data upon which her opinion rested. The SSA's factual findings on the kind and number of jobs available to applicants for disability benefits are conclusive as long as they are supported by "substantial evidence." 42 U.S.C. §405(g). In denying former construction worker Michael Biestek's application for disability benefits, the SSA Administrative Law Judge relied on an expert's testimony about the availability of less physically demanding jobs, which was based on private market-survey data that the expert refused to provide to Biestek because they were part of her client files. Biestek appealed, arguing that the expert's testimony could not be "substantial evidence" because she refused to produce the supporting data. The Sixth Circuit affirmed the denial of benefits, rejecting Biestek and the Seventh Circuit's categorical rule that an expert's testimony cannot be substantial evidence unless the supporting data is produced upon the applicant's request. In an opinion by Justice Kagan, the Court affirmed.

The Court rejected the categorical rule that expert testimony is substantively inadequate unless the supporting data is produced upon the applicant's demand. The Court explained that under the substantial-evidence standard governing judicial review of agency factfinding, a court looks to the administrative record and asks merely whether it contains evidence that a reasonable mind could find sufficient to support the agency's factual determinations. The Court noted that Biestek and the Seventh Circuit's rule would render the sufficiency of the evidence supporting the agency finding contingent on the applicant's request for the testifying expert's supporting data, rather than the substance of the expert's testimony. The Court then rejected two arguments in support of the categorical rule: that an expert's refusal to produce data (1) warrants an adverse inference and (2) prevents effective cross-examination. The Court explained that an expert who refuses to produce supporting data may still be credited if she offers good reasons to refuse. The Court further explained that an expert's refusal to produce data does not prevent cross-examination because applicants can still explore the strength of the expert's sources and methodology. The Court added that the same limitation on cross-examination is present even under Biestek's proposed rule where supporting data is unavailable because it is missing. The Court declined to reach the question whether the testimony presented in Biestek's case constituted substantial evidence in support of the agency's decision to deny him benefits because he did not ask it to do so.

Justice Sotomayor dissented on the ground that the evidence presented in Biestek's case was not substantial. Justice Sotomayor was concerned that the Administrative Law Judge, whose role in the inquisitorial (rather than adversarial) hearing is to develop the facts and arguments both for and against granting benefits, did not adequately explore the basis of the expert's testimony. Justice Gorsuch, joined by Justice Ginsburg, also dissented. Justice Gorsuch agreed with "the Seventh Circuit in thinking that an agency expert's bottom-line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy the government's statutory burden of producing substantial evidence of available other work." More specifically, in his view, "[t]he case

hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that?" He cautioned that "[t]he principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking."

● *Republic of Sudan v. Harrison,* 16-1094. In an 8-1 decision, the Court held that civil process cannot be served on a foreign state by means of a mailing that names the state's foreign minister but is sent to the state's embassy in the United States. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state may be served by a mailing "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. §1608(a)(3). Respondents—victims of the October 12, 2000 bombing of the USS *Cole* in Yemen and their families—sued the Republic of Sudan in federal district court under the terrorism exception to the FSIA, alleging that Sudan provided material support to al Qaeda for the bombing. Respondents mailed the service packet to the Sudanese embassy in Washington, D.C., addressed to the person they believed to be the Sudanese foreign minister. After Sudan failed to appear, the district court entered a $314 million default judgment against it. When respondents registered the judgment in a different district court and obtained three turnover orders, Sudan appeared and appealed those orders. It contested jurisdiction on the ground that under §1608(a)(3) the service packet must be sent to the foreign minister at his principal office in Khartoum, not Sudan's embassy in the United States. The Second Circuit affirmed the orders. In an opinion by Justice Alito, the Court reversed and remanded.

The Court began by analyzing the plain language of §1608(a)(3), which says that service must be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Based on the meaning of the words "addressed" and "dispatched," the Court concluded that service must be "mailed directly to the foreign minister's office in the foreign state." The Court conceded that "this is not . . . the only plausible reading of the statutory text," but found it "the most natural one." As the Court explained, a letter is "addressed" to an intended recipient when the recipient's name and "address" are placed on the outside of the letter. The Court reasoned that because a foreign nation's embassy is neither the foreign minister's residence or usual place of business, nor where the minister can customarily be found, the plain meaning of "address" was inconsistent with respondents and the Second Circuit's interpretation of §1608(a)(3). The Court found its reading supported by §1608(a)(3)'s use of the term "dispatch," which means "to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." The Court reasoned that a person would not "dispatch" a letter to someone "in a roundabout way, such as directing it to a third party who, it is hoped, will then send it on to the intended recipient."

The Court found that other provisions supported its reading. Section 1608(b)(3)(B), which governs service on "an agency or instrumentality of a foreign state," allows service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk" if it is "reasonably calculated to give actual notice." Similarly, §1608(b)(2) provides for service by delivery to an officer or agent of the agency or instrumentality of a foreign state or "to any other agent authorized by appointment or by law to receive service of process in the United States." Had Congress intended service on a foreign

state under §1608(a)(3) to be effected by mailing to the state's embassy in the United States, it would have, as it did in §1608(b)(2), expressly allow service on an agent, specified who may be served as an agent of a foreign state, and made clear that the service may occur in the United States.

Finally, the Court found that its interpretation of §1608(a)(3) avoids potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations. The Court reasoned that allowing service on a foreign minister at an embassy rather than the minister's principal office would have made it easier to serve a foreign state than a person in that foreign state, creating "an odd state of affairs for a foreign state's inhabitants to enjoy more protections in federal courts than the foreign state itself, especially given that the foreign state's immunity from suit is at stake." The Court said that its reading also avoids potential conflict with Article 22(1) of the Vienna Convention, which provides that "[t]he premises of the mission shall be inviolable," such that "[t]he agents of the receiving State may not enter them, except with consent of the head of the mission." The Court's reading of §1608(a)(3) as precluding service at an embassy—which adopts the longstanding view of the State Department—"avoid[s] the potential international implications of a contrary interpretation." The Court acknowledged that Congress could have drafted §1608(a)(3) to specify the location at which a foreign minister must be served and that the absence of this specification "is respondents' strongest argument." It concluded that there was "no other satisfactory response other than that §1608(a) does not represent an example of perfect draftsmanship" and that respondents' argument was outweighed "by the countervailing arguments already noted."

Justice Thomas dissented on the ground that the text of §1608(a)(3) did not specify that service packets must be mailed to foreign ministers' offices in their home countries. "Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D.C. is, absent an indication to the contrary, a place where a U.S. litigant can serve the state's foreign minister." Justice Thomas noted that State Department regulations implementing §1608(a)(4)—under which service is effected by the State Department through diplomatic channels—allow delivery of service packets "to the embassy of the foreign state in the District of Columbia" if the state so requests or if otherwise appropriate. 22 C.F.R. §93.1(c)(2) (2018). He concluded that, "[b]ecause an embassy serves as a channel through which the U.S. Government can communicate with the sending state's minister of foreign affairs, this method of service complied with the ordinary meaning of §1608(a)(3)," unless the foreign state declined to accept service packets at its embassy.

II. Cases Granted Review

● *Kansas v. Glover*, 18-556. At issue is whether police officers have reasonable suspicion to stop the driver of a car on the ground that the car's registered owner's license has been revoked—even though the officer does not know whether the one driving the car is the owner. While on routine patrol, Deputy Sheriff Mark Mehrer ran a registration check on a pickup truck and discovered that the truck was registered to Charles Glover, Jr, and that Glover's driver's license had been revoked. Deputy Mehrer stopped the truck to investigate because he "assumed the registered owner of the truck was also the driver." That turned out to be the case, and Glover was charged as a habitual driver for driving while his license was revoked. He moved to suppress the evidence from the stop on the ground that Mehrer lacked reasonable suspicion to make the stop. The district court granted

Glover's motion to suppress, the Kansas Court of Appeals reversed, but the Kansas Supreme Court reversed in turn. 422 P.3d 64.

The Kansas Supreme Court reasoned that allowing a traffic stop in this circumstance required "stacking unstated assumptions": that "the registered owner was likely the primary driver of the vehicle" and that "the owner will likely disregard the suspension or revocation order and continue to drive." The court refused to accept those assumptions, finding that "courts should presume that citizens are engaged in lawful activities and have a right to remain free from police interference." In short, "Deputy Mehrer should have presumed Glover was obeying the revocation order and therefore was not the driver." Lacking any "specific and articulable facts" to the contrary, held the court, the officer lacked reasonable suspicion.

Kansas argues that 12 state high courts, 13 intermediate state appellate courts, and four federal circuits have reached the opposite conclusion. These courts, says Kansas, have "held, as a matter of common sense, that officers may infer that the registered owner of a car is the one most likely to be driving the car at that moment." (Quotation marks omitted.) Although "it is *possible* someone other than the vehicle's registered owner could drive the vehicle, it was still *reasonable* for an officer to suspect that the registered owner is the driver." To require more, said then-Judge Gorsuch in a Tenth Circuit case on this issue, would take us "into the land of requiring an officer to have probable cause before effecting any stop." Kansas adds that the fact that "the owner of a vehicle has a suspended license or is otherwise subject to seizure *is* the 'articulated fact' that provides a 'founded suspicion' sufficient to justify stopping the vehicle." Finally, Kansas notes that "requiring officers to confirm a driver's identity is both unrealistic and dangerous."

The Supreme Court Report is published biweekly during the U.S. Supreme Court Term by the NAAG Center for Supreme Court Advocacy.

SUPREME COURT CENTER STAFF

Dan Schweitzer
Director and Chief Counsel
NAAG Center for Supreme Court Advocacy
(202) 326-6010

Joshua M. Schneider
Supreme Court Fellow
(202) 326-6265

Nicholas M. Sydow
Supreme Court Fellow
(202) 326-6048